With respect to the public interest, the only difference in this Application is the fact that the California PUC has issued an order that purports not to be able affirmatively to conclude that authorizing Pacific to provide intrastate interLATA services would be in the public interest. But as DOJ has recognized, a majority of the California PUC did not support that conclusion: of the five CPUC commissioners, two dissented from this portion of the decision, and a third voted "no" on the entire decision. See DOJ Eval. at 4 n.12. Moreover, "the California PUC recently solicited further comment to assist it in concluding its inquiry under Section 709.2(c) by the end of the year." Id. at 5. DOJ expressly deferred to this Commission regarding what effect, if any, this continuing state proceeding might have on whether Pacific has satisfied the "federal public interest standard," and it also acknowledged that section 271 "does not require [the FCC] to give special weight to state commission views." Id. at 5 & n.15.

A. Nothing in This Record Undermines the Conclusion That Consumers Will Benefit from SBC's Entry into the In-Region, InterLATA Market

SBC has already addressed the deficiencies in the "findings" underlying the CPUC Final Decision regarding section 709.2. See SBC Br. at 96-99; see also Batongbacal Reply Aff. ¶¶ 11-13 (Reply App., Tab 1). But AT&T has now identified additional issues that it claims have arisen since the California PUC's record closed and that supposedly "further support[]" the determination that SBC's entry into the long-distance market would not be in the public interest. AT&T's recent "evidence" is no more persuasive than the CPUC Final Decision's old evidence. Even a cursory review of these accusations reveals that they have nothing whatsoever to do with Pacific's conduct with respect to wholesale customers or with anything remotely relevant to the public-interest inquiry,

So, for example, what AT&T describes as a "$27 million fine for defrauding DSL consumers and misleading the CPUC," AT&T Comments at 76, was really a settlement of billing disputes resulting from system issues that arose when Pacific had to transfer all advanced services to its affiliate under the SBC/Ameritech Merger Conditions. See Batongbacal Reply Aff. ¶¶ 2-6. Similarly, AT&T, PacWest, and Vycera all discuss a so-called "$25 million fine" against Pacific "for misleading marketing tactics in violation of state regulations," AT&T Comments at 77, yet they misrepresent the nature of the complaints and get critical facts wrong, see Batongbacal Reply Aff. ¶¶ 7-10. At bottom, that case involved a dispute over whether Pacific sales representatives complied with CPUC guidelines when selling certain optional retail services. Not only is Pacific seeking review of the California PUC's controversial decision in this matter, but the underlying issues have absolutely nothing to do with Pacific's commitment to ensuring that the local markets remain open to competition, see id., and are therefore beside the point, see, e.g., New Jersey Order ¶ 190 (where "allegations do not relate to the openness of the local telecommunications markets to competition," the Commission will not "deny or delay **[an]** application under the public interest standard").

Against economic logic and historical experience, AT&T also argues that SBC's entry into the long-distance market will not lead to increased competition. See AT&T Comments at 84-85. Yet the entire basis for this argument is that "SBC Management, in a meeting on September 10,2002, indicated that there would be no 'price war' in consumer long distance, and instead that 'RBOC pricing is in-line or higher than the IXCs.'" Id. at **84** (quoting Bears, Steams & Co. report, Attach. 1 to AT&T Comments). There is, of course, no requirement that, in order to obtain section 271 relief, a Bell company must demonstrate that its long-distance affiliate will

be the lowest price provider of long-distance service. Nor does the fact that SBC's long-distance rates are "in-line" with the incumbent carriers' mean that SBC's presence has no disciplining effect on the prices that other carriers may charge. In other words, the absence of current intentions to engage in a "price war" does not mean that SBC's entry will not constrain AT&T from imposing unilateral price increases as it has so often done in the past.[28]

Moreover, SBC's long-distance affiliate has gained market share in the Southwestern Bell states not only because of its competitive pricing plans, but also because of the quality and reliability of its service, as well as the confidence and trust that consumers have in the company. SBC offers a variety of service packages and bundled offers that compete with those of incumbent carriers and clearly offer a tangible benefit to consumers.[29] And even where SBC does not offer the lowest price, that does not mean that other carriers have not chosen to compete with SBC by lowering their prices.[30] In short, if AT&T takes the absence of a "price war" to mean that it will not face competition for its massive long-distance customer base in California upon grant of this Application, it is sorely mistaken

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[28] See, e.g., AT&T to Raise Some Rates by as Much as 11 Percent, N.Y. Times, June 2, 2001, at C4 (reporting that AT&T had announced increase in long-distance rates paid by 28 million customers by as much as 11 percent); Ben Chamy, AT&T Splits Bill, Adds Charge, CNET News.com, Aug. 24,2001 ("About 1 million AT&T customers can expect a couple of new things in the mail: two separate bills instead of the usual one and an extra charge of $9.95 a month.").

[29] See SBC, Products/Services, at http://www.sbc.com/products_services/0,5931,27,00.html.

[30] See generally Jerry A. Hausman, Gregory K. Leonard & J. Gregory Sidak, The Consumer-Welfare Benefits from Bell Company Entry into Long-Distance Telecommunications: Empirical Evidence from New York and Texas 3 (Jan. 9, 2002), at http://papers.ssrn.comi sol3/papers.cfm?abstract_id=289851.

Along with PacWest and Vycera, AT&T next alleges that Pacific has abused its role as the Preferred Interexchange Carrier ("PIC") administrator, and that such misconduct creates the prospect of harm to the interexchange market. See AT&T Comments at 79-81; Vycera Comments at 30-37; PacWest Comments at 16-18. But even if these isolated allegations of misconduct were true – and they are not – this Commission has repeatedly stated that it "will not withhold section 271 authorization on the basis of isolated instances **of** allegedly unfair dealing or discrimination under the Act." Texas Order ¶ **431**; see New Jersey Order ¶ 184 ("anecdotal evidence is not sufficient to demonstrate that [an] application is not in the public interest").

In any case, commenters' complaints in this regard reflect little more than displeasure in being unable to "slam" customers with impunity. As Cynthia Wales explains in her reply affidavit, the carriers' specific allegations of abuse are really the flip-side of slamming disputes. Vycera, for example, claims that it has encountered more problems with Pacific as PIC administrator than it has with other BOCs in other states, see Vycera Comments at 31, but the number of interLATA slamming claims that customers have brought against Vycera is substantially higher than the average Pacific has experienced with other interLATA carriers, see Wales Reply Aff. ¶¶ 10-11 (Reply App., Tab 18).[31] Pacific responds to such slamming claims in conformance with state and federal regulations – i.e., by switching the customer back to his or her preferred carrier and assessing the appropriate charges. See id. ¶ 8. And, to the extent Pacific's performance of this function has been investigated by the CPUC, that investigation has

[31] Cynthia Wales explains how a manual coding error that affected a small portion of records during the summer of 1999 accounts for the mistake that is described in the affidavit of Derek M. Gietzen, attached to Vycera's comments. See Wales Reply Aff. ¶ 13. Pacific promptly credited Vycera for the incorrect charges, and it explained the matter to Mr. Gietzen's attorney in September 1999. See id. ¶ 13n.6.

revealed no evidence of any pervasive or systematic mishandling of slamming claims. See id. ¶¶ 19-23 & Attach. A.

Notwithstanding the utter absence of any evidence of systemic problems with Pacific's PIC administration, a few commenters suggest that the Commission should withhold section 271 relief in the absence **of** a "neutral" PIC administrator. See, e.g., PacWest Comments at 17-18; Vycera Comments at 36-37. Pacific opposes the imposition of a third-party PIC administrator for the simple reason that it would complicate both the processing of carrier-change requests and the prompt resolution of disputes. See Wales Reply Aff. ¶ 18. Indeed, this Commission has already considered and rejected proposals to require a third-party administrator.[32] It surely cannot, therefore, be a requirement for satisfying the public-interest standard in section 271. In fact, the CPUC itself has stopped short of requiring a third-party PIC administrator, in favor of an investigation into "the costs and feasibility" of such an approach. CPUC Final Decision at 264. Although Pacific believes that such an investigation is unnecessary and wasteful, it is clear that this issue has not yet been resolved by the California PUC. It would accordingly be premature – and contrary to precedent – for the Commission to weigh-in on the matter. See, e.g., Pennsylvania Order ¶ 133 (deference is appropriate where matter is pending "with the appropriate state commission"); Georgia/Louisiana Order ¶ 303 (noting that, "in the absence of a formal complaint to [the Commission]," the Commission will assume that issues will be "appropriately handled at the state level").

[32] See First Order on Reconsideration, Implementation of the Subscriber Carrier Selection Provisions of the Telecommunications Act of 1996, 15 FCC Rcd 8158, ¶ 26 (2000).

Finally, a number of commenters allege that Pacific's plans to market long-distance service on behalf of Southwestern Bell Communications Services ("SBCS") means that SBC's entry into the interLATA market will harm the public interest. E.g., AT&T Comments at 78-79; PacWest Comments at 9-12; Vycera Comments at 20. This argument is difficult to fathom. Joint marketing is expressly authorized by the 1996 Act. See 47 U.S.C. § 272(g); South Carolina Order ¶ 239. And, as the Commission has held time and again in multiple contexts, where joint marketing is conducted pursuant to statute and Commission rules, the resulting "efficiencies" and "innovations" enhance the public interest.[33] It is simply impossible to see how SBC's plans to exercise a right expressly authorized by the statute – and repeatedly found by the Commission to further the public interest – could somehow cause SBC's Application to fail the public-interest standard set out in section 271

Nor is this argument strengthened by commenters' reliance on the CPUC's suggestion that it may seek to impose additional restrictions – above and beyond those required by federal law – when Pacific markets intrastate interLATA service. See CPUC Final Decision at 248-52. There is, of course, a significant question whether the CPUC has the authority to impose any

[33] See, e.g., Report and Order, Comuuter III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 7571, ¶¶ 100-104 (1991) (significant public-interest benefits accrue from the "efficiencies" and "innovations" that can be obtained by permitting joint marketing of basic and enhanced services); Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, Telephone Comuanv-Cable Television Cross-Ownershiu Rules, Sections 63.54-63.58, 7 FCC Rcd 5781, ¶ 93 n.243 (1992) ("there are significant public interest benefits arising from the efficiencies and innovations that can be obtained by permitting some integration of basic and enhanced services, including joint marketing"); Fourth Further Notice of Proposed Rulemaking, Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, 10 FCC Rcd 4617, 129 (1995) (noting Commission finding "that significant public interest benefits can accrue from the efficiencies and innovations that may be obtained by permitting LECs to engage in joint marketing" of certain services).

such restrictions in the first place. But, even putting that aside, there can be no serious argument that, if the CPUC decides to exercise such authority, Pacific would have to show compliance with those additional regulations in order to meet its burden under section 271. The Commission has set out a "safe harbor" to provide "guidance on what [the Commission] view[s] as consistent with section[] ... 272." South Carolina Order ¶ 236. No party disputes that Pacific's joint-marketing plans fit comfortably within that safe harbor, and the CPUC itself acknowledges that Pacific's plans are consistent with federal law. See CPUC Final Decision at 249. As far as compliance with section 271 is concerned, that is the end **of** the matter.[34]

B. This Commission Should Reaffirm Its Long-Held Position That State Commissions Have No Authority To Deny, Condition, or Delay BOC Entry into Intrastate InterLATA Markets

A few commenters suggest that, in the absence of an express state-commission finding that SBC's interLATA entry in California would be in the public interest, this Commission may not grant this Application. See. e.g., PacWest Comments at **4-6;** Vycera Comments at 19-21. But, as SBC explained in its opening brief, both the statute and Commission precedent make clear that this Commission has sole authority under section 271 to determine whether the "requested authorization" is in the public interest. See SBC Br. at 99-101; 47 U.S.C. § 271(d)(3)(C); South Carolina Order ¶ 27. Accordingly, the CPUC's views on the public interest – even assuming they were set forth with the backing of **a** majority of the CPUC commissioners and were based on evidence relevant to this Commission's public-interest analysis – would be entitled to no more weight than those of any other party.

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[34] AT&T's public-interest arguments also rely on misleading and misguided allegations regarding a so-called "audit" recently provided to the CPUC. See AT&T Comments at 73-76. These allegations are addressed below. See infra Part IV.

Nor can there be any serious argument that, in the event the CPUC does not conclude its section 709.2 proceeding prior to this Commission's approval of this Application, it would have any bearing on SBC's right to provide interLATA service immediately upon this Commission's authorization. This Commission has already made clear that its authority under sections 271 and 272 is exclusive and that its exercise of that authority cannot be undermined by state regulation. In particular, in the Non-Accounting Safewards Order,[35] the Commission held that "reading sections 271 and 272 as granting the Commission authority over intrastate as well as interstate interLATA services is consistent with, and indeed necessary to effectuate, Congress's intent that sections 271 and 272 replace the restrictions of the [Modification of Final Judgment] with respect to BOC provision of interLATA services."[36] The Commission went on to clarify that "the rules we establish to implement section 272 are binding on the states, and the states may not impose, with respect to BOC provision of intrastate interLATA service, requirements inconsistent with sections 271 and 272 and the Commission's rules under those provisions."[37]

In light **of** the CPUC Final Decision's ambiguous statements regarding section 709.2 of the California Public Utilities Code – as well as the uncertainty surrounding when the CPUC will conclude its current proceeding – this Commission should once again make clear that it has exclusive jurisdiction over whether a Bell company is entitled to provide both intrastate and

[35] First Report and Order and Further Notice of Proposed Rulemaking, Implementation of the Non-Accounting Safewards **of** Sections 271 and 272 of the Communications Act of 1934. as amended, 11 FCC Rcd 21905 (1996) ('"on-Accounting Safeguards Order"), modified on recon., 12 FCC Rcd 2297, further recon., 12 FCC Rcd 8653 (1997).

[36] Id. ¶ 34; see also id. ¶ 35 ("[W]e find that the Commission's authority under sections 271 and 272 extends to both intrastate and interstate interLATA services.").

[37] Id. ¶ 47.

interstate interLATA services and how a Bell company may interact with its long-distance affiliate. As it did in the Non-Accounting Safeguards Order, this Commission should thus "reject the suggestion by the [state commission] that, after the Commission has granted a BOC application for authority under section 271, a state nonetheless may condition or delay BOC entry into intrastate interLATA services."[38] Given the state of communications markets today, it is essential that SBC's ability to provide California consumers with an alternative to the incumbent long-distance providers not be thwarted or delayed by wasteful litigation over a provision of state law that became superfluous with the enactment of the 1996 Act. A clear and unambiguous statement from this Commission would substantially reduce the risk that the public-interest benefits of long-distance relief in California will be stymied by unlawful attempts to assert state authority over matters that are exclusively within this Commission's jurisdiction.

C. The Alleged "Price Squeezes" Are Unproven and Implausible

In light of the D.C. Circuit's decision in Sprint, a number of commenters have tried to turn their run-of-the-mine objections to certain rates – some of which are not even germane to Pacific's compliance with the competitive checklist – into price-squeeze arguments. They have not succeeded.

As an initial matter, no commenter has attempted to connect its price-squeeze claim to the public-interest standard traditionally applied by this Commission in the section 271 context. In Sprint, the D.C. Circuit remanded for further explanation a price-squeeze claim that, on its face at least, alleged that competitors were ***"doomed. . .*** to failure" in competing in the local exchange market. 274 F.3d at 554. While SBC maintains that this allegation was and remains

[38] Id.

entirely without merit, it at least purported to involve the openness of the local market, and it therefore could plausibly be considered relevant to the Commission's public-interest analysis. Here, by contrast, commenters' price-squeeze claims involve only portions of the communications marketplace – broadband Internet access, payphones, and high-capacity transmission – and they have made no effort to explain how those claims could be relevant to the Commission's public-interest standard. The claims should be rejected for that reason alone.

The claims should also be rejected for their outright failure to adhere to the evidentiary standards this Commission has articulated for price-squeeze claims in the section 271 context. Echoing the Sprint case itself, the Vermont Order made clear that, to establish a price-squeeze claim, a commenter must show that the pricing in question "'*doom[s]* competitors to failure."' Vermont Order 766 (quoting Sprint, 274 F.3d at 554). Such a showing requires, first and foremost, an analysis of the profitability of using *all* entry vehicles to provide *all* potential services to *all* segments **of** the market. Thus, after Vermont, it is not enough to show, for example, that one type of service to one type of customer is unprofitable. Rather, the Commission has made clear that a price-squeeze analysis that ignores other types of services and other potential customers is meaningless. E.g., id. ¶ 67. Likewise, the Commission has directed commenters not to isolate the expected revenues from providing one type of service to one type of customer, but rather to evaluate their ability to "leverage their presence" in one line of business "into an economically viable" offering in another. Id. ¶ 71. On the cost side, the Commission has also made clear that competitors' bare assertions about the internal costs they face will not suffice. E.g., Five-State Order ¶¶ 288,292. Instead, commenters that wish to make out a price-squeeze claim must provide, at a minimum, "cost and other data" to calculate "a sufficient profit for an efficient competitor." Vermont Order ¶ 70. Finally, the Commission has

stressed that a price-squeeze claim must account for the universal service subsidies that remain built into numerous regulated rates, as well as the fact that any difficulty entering particular markets "may be the result of subsidized" rates. Id. 768.

The price-squeeze claims raised in this proceeding do not merely ignore the Commission's instructions, they defy them. Indeed, each of them focuses exclusively on a narrow slice of the communications marketplace, without any regard for whether a viable product offering can be provided in connection with other services. Moreover, none of them has even identified the margin that they believe is necessary to provide the service in question, much less have they provided the sort of cost data the Commission has said is necessary to determine the accuracy of their belief. Nor has any of these commenters alluded to the existence **of** universal service, **or** accounted for the impact it may have in the retail rates of the services they seek **to** provide. In short, these commenters' complete failure to provide the "highly complex" evidence necessary to establish a price squeeze, or even to "address any of the factors that [the Commission] identified in past orders," gives the Commission **an** "inadequate basis" to determine that a price squeeze exists in any segment of the market in California. Five-State Order ¶¶ 281, 285.

Even putting all of that aside, the price-squeeze allegations raised by these commenters would still fail. That is ***so*** because each of them alleges a price squeeze in a market that is subject to competition. In such markets, because SBC has no power over retail price, it would be unable to recoup the losses incurred in the pursuit of a predatory strategy. Thus, as the declaration of Robert Crandall explains, the strategy hypothesized by these commenters is irrational. See Crandall Decl. ¶¶ 1, 9 (Reply App., Tab **4).**

Thus, for example, PacWest and DIRECTV argue that SBC has created a price squeeze by setting its wholesale DSL service rates too high, and its broadband Internet access rates too low. See PacWest Comments at 26-29; DIRECTV Comments at 4-7. But the retail rate for broadband Internet access is set by the market. See Grasso Reply Aff. ¶ 5 (Reply App., Tab 6). In that circumstance, a price squeeze makes no economic sense. See Crandall Decl. ¶¶ 16-19.

Similarly, Mpower and Ernest argue that SBC has entered into agreements with various aggregators in California to provide payphone lines to payphone service providers at illegal discounts from its tariffed rates, thereby creating a price squeeze against competitive local providers of payphone services. See Mpower Comments at 8-10; Ernest Comments at 2-4. The payphone industry is plagued by over-capacity, however, and it is facing an onslaught of competition from wireless providers. See Crandall Decl. ¶ 21. It is therefore impossible to see what SBC could hope to gain from adopting a predatory strategy for these services. See id. ¶¶ 20-24.[39]

Finally, XO argues that Pacific's UNE rates for DS1 and **DS3** loops effect a price squeeze on CLECs by preventing CLECs from competing for the customers that purchase high-capacity transmission services from Pacific. XO Comments at **32-33.** But the segment of the marketplace served by such high-capacity loops is perhaps the most competitive in the industry. **As** DOJ notes, "[c]ompetitors have made significant progress in penetrating the business market in California," serving "approximately 20.8 percent of all business lines in SBC's California service area" in large part over "their own networks." DOJ Eval. at 6. The notion that Pacific's wholesale pricing has rendered CLECs unable to compete for "the more profitable segments of

[39] See also Shannon Reply Aff. ¶¶ 22-26 (explaining that commenters' claims regarding payphone access line pricing are the subject of a complaint proceeding before the CPUC).

the market" is absurd. See XO Comments at **33.** In any case, in view of this extensive competition, the predatory strategy contemplated by PacWest is unrealistic and untrue. See Crandall Decl. ¶¶ 25-29.[40]

D. Pacific Is Subject to Comprehensive Performance Reporting and Monitoring Requirements

Pacific's public-interest showing is bolstered by the comprehensive performance incentive plan implemented and overseen by the CPUC. This plan includes reporting requirements that track all aspects of Pacific's performance under the 1996 Act, as well as incentive payments that subject Pacific to up to $50 million of liability each month if it fails to provide nondiscriminatory service to CLECs. As it has in other applications, the Commission can take comfort in this rigorous oversight, which will ensure that any post-entry back-sliding would be swiftly detected and severely sanctioned![41]

AT&T disputes the efficacy of this plan on the ground that it relies on performance data that, according to AT&T, are unreliable. See AT&T's Toomey/Walker/Kalb Decl. ¶¶ 22-54. As an initial matter, however, AT&T does not come to this subject with clean hands. As Gwen S. Johnson explains in her reply affidavit, Pacific has recently learned – and AT&T has recently confirmed – that AT&T has been sending Pacific bogus loop qualification requests that had the effect not only of taking Pacific's loop-qualification performance out-of-parity, but also of

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[40] AT&T's casual references to a supposed price squeeze involving intraLATA toll and vertical features are addressed in the reply declaration of Dale E. Lehman (Reply App., Tab 11).

[41] See DOJ Eval. at **2-3** (noting that a substantial portion of the CPUC's "tireless[]" work "to create an environment conducive to the development of local . . . competition" was directed at "establish[ing] . . . wholesale performance measures" and "adopt[ing] a [p]erformance [i]ncentives [p]lan . . . intended to **ensure** that **an** appropriate level of wholesale performance is maintained once SBC's Section 271 application is approved").

generating substantial incentive payments. See Johnson Reply Aff. ¶ 58 n.50. Given AT&T's egregious behavior in this regard, its allegations regarding the "integrity" of Pacific's data cannot be taken seriously.

These allegations, moreover, misstate the standard the Commission uses to examine claims regarding data integrity. While AT&T seeks "incontrovertible proof" that Pacific's data are accurate, see AT&T's Toomey/Walker/Kalb Decl. ¶ 45, the Commission has demanded only that the data be "generally reliable." E.g., New Jersey Order ¶ 181; see also Five-State Order ¶¶ 16-17. Pacific's data easily pass that standard: they have been verified in a comprehensive third-party audit, the structure of which AT&T itself helped to design; they have been been checked (and re-checked) through the course of multiple data reconciliations with CLECs (including AT&T); and they are subject to further auditing at the CLECs' election, if in fact any CLEC truly believes that Pacific's data are, as AT&T alleges, "untrustworthy." See Johnson Reply Aff. ¶¶ 60-61; see also DOJ Eval. at 2 & n.4 (noting that Pacific's performance reporting audit was ultimately "clos[ed] . . . without exception").

AT&T's attack on Pacific's data **is** also notable for what it does not include. AT&T does not present a single challenge to the integrity of specific performance data on which Pacific relies in this Application. Indeed, the **only** specific issue AT&T raises is a newfound concern over the leeway Pacific purportedly has to identify CLEC-caused troubles for maintenance and repair exclusions. See AT&T's Toomey/Walker/Kalb Decl. ¶¶ 51-53. This claim, which in any event is misguided, see Johnson Reply Aff. ¶¶ 76-77, goes not to the integrity of Pacific's performance reporting but to the reasonableness of the business rules that govem its data – a subject the Commission has properly avoided in the past, see, e.g., New Jersey Order ¶101

n.275. The Commission ha5 previously noted that, "[w]here particular. . . data are disputed by commenters," those disputes should be addressed in the Commission's discussion of the relevant checklist item. Texas Order ¶ **57;** see Five-State Order ¶ 19. Yet, for all its rhetoric, AT&T has failed to come up with a concrete dispute that the Commission ***could*** address in its discussion of a relevant checklist item. AT&T's challenges to Pacific's performance data should be rejected out-of-hand.

AT&T next turns to the incentive plan adopted by the CPUC and alleges, along with XO, that its structure is insufficient to deter discriminatory service. AT&T Comments at 87-89; XO Comments at 29-32. Here again, however, these commenters fail to acknowledge the deference the Commission affords state commission determinations in this regard. As the Commission has made clear, just as it "do[es] not require any monitoring and enforcement plan" in the first place, it "do[es] not impose requirements **for** its structure.'' Pennsvlvania Order ¶ 128. Rather, the Commission reviews the plan in question to determine whether it "provides incentives to foster post-entry checklist compliance," and, if it does, it takes that into account in determining whether the local market is likely to remain open in the wake of section 271 entry. Id. ¶ 129. The plan at issue here is self-executing, it puts $50 million at **risk** each month, and it calibrates payments based on the importance of the performance measure at issue and the frequency and severity of the miss. See Johnson Aff. ¶¶ 222,229-237,239 (App. **A,** Tab 12). It is plainly sufficient to foster post-entry checklist compliance.

AT&T and XO complain that the plan's "curvilinear" structure unduly limits the payments for which Pacific is liable, and therefore limits the efficacy of the plan. See AT&T Comments at 87-89; XO Comments at 30. That structure, however, ensures that payments

remain low when Pacific's service quality is strong, but ratchet-up quickly when service quality deteriorates. See Johnson Aff. ¶¶ 234-235. The plan thus creates a strong incentive to provide outstanding service to the CLECs. The plan advocated by AT&T and XO, by contrast, would require Pacific to pay out enormous sums to CLECs even if it was providing high-quality service, and it would thus limit Pacific's incentive to provide such service. Such a plan might benefit those CLECs that have built business plans around receiving incentive payments from Pacific – and it might well encourage other CLECs to follow AT&T's lead and generate incentive payments by submitting bogus orders – but it would do little to encourage checklist compliance.

The absurdity of AT&T's and XO's argument on this score is demonstrated by the so-called "proof' they offer: that Pacific's liability under the plan was "only" **$673,390** in April **of** this year. XO Comments at **30-31;** AT&T Comments at **89.** For one thing, that amount is hardly trivial, particularly when it is coupled with the many other "means of ensuring that [Pacific] continues to provide nondiscriminatory service to competing carriers." Pennsylvania Order **¶ 130.** And, in any event, even if one somehow assumes that this amount is insignificant, the only thing it proves is that Pacific's wholesale performance has been outstanding. With the CPUC-approved performance plan in place, and with the numerous other incentives to ensure that Pacific continues to provide nondiscriminatory service, there is every reason to believe that it will remain that way.

IV. SBC WILL PROVIDE INTERLATA SERVICES IN COMPLIANCE WITH THE REQUIREMENTS OF SECTION 272

No party disputes that the showing of section 272 compliance set out in the Application is identical in all material respects to the showing SBC provided in Texas, Kansas, Oklahoma,

Missouri, and Arkansas. See SBC Br. at 102-03. It involves the same long-distance affiliate, SBCS, that is currently operating in those five states. See Carrisalez Aff. ¶ **8** (App. A, Tab 2). That affiliate, moreover, will operate in California according to the same structural separation, nondiscrimination, and accounting safeguards as are in place in those states. See id. ¶ 5; Yohe Aff. 7 7 (App. A, Tab 24); Henrichs Aff. ¶ 9 (App. A, Tab 9). Because the Commission approved these safeguards throughout the SWBT region,[42] Pacific's showing here requires the same result. Indeed, SBC's showing in California is even stronger than it was in those cases – and therefore even more deserving of approval – because it builds upon the track record of compliance SBC has developed in its provision of interLATA service in the SWBT region.

Alone among commenters, AT&T contends that what was sufficient to warrant the Commission's approval in Texas, Kansas, Oklahoma, Missouri, and Arkansas is not sufficient for California. That is ***so*** because, according to AT&T, a so-called "2002 Pacific Audit Report" – conducted "on behalf **of** the CPUC" – revealed "blatant subsidization by Pacific o f . . . SBCS" that purportedly "precludes any rational finding" that SBC will comply with section 272 in California. AT&T Comments at 55-64.

As an initial matter, however, AT&T's characterization of this so-called "CPUC-sponsored" "audit report" is highly misleading. The report in question is not an audit. Rather, it was prepared by a consulting firm (the Overland Consulting Group) that is not a certified public accountant, and it was not conducted in accordance with Generally Accepted Accounting Standards. See Borsodi Reply Aff. ¶ 13 (Reply App., Tab 2). In addition, the report does not

[42] See Texas Order ¶ 396; Kansas/Oklahoma Order ¶ 257; Arkansas/Missouri Order ¶ 123. No party appealed the Commission's finding of compliance with section 272 in any of these proceedings.

represent the findings of the CPUC. On the contrary, it is an advocacy document that has been provided *to* the CPUC, and it is the subject of ongoing litigation over whether and the extent to which it has any legitimacy. See id. ¶¶ 14-15. Finally, Overland did not investigate the existing relationship between Pacific and SBCS, much less did it do so for the purpose of determining compliance with section 272. Instead, the Overland investigation was intended to review Pacific's compliance with state price-cap regulation during the years 1997-1999. See id. ¶¶ 3, 6.[43]

AT&T's mischaracterizations extend beyond what the Overland report is to encompass what the report found. Thus, for example, AT&T contends that the report "uncovered blatant subsidization by Pacific of . . . SBCS" – to wit, purported payments of money by Pacific to SBC "for [Pacific's] use of the SBC name in California." AT&T Comments at 58. What the report in fact "uncovered," however, was that Pacific pays for the use of several trademarks, including the "Pacific Bell Telephone Company" name. See Borsodi Reply Aff. ¶ 11. That so-called discovery is something that neither Pacific nor SBC has ever made secret, and the payments in question had no impact on regulated earnings or the prices paid by Pacific customers. See id.

Even where AT&T accurately characterizes the Overland Group's conclusions, moreover, it vastly overstates the relevance of those conclusions to SBC's section 272 showing. AT&T claims, for example, that the Overland report concluded that Pacific "effectively

[43] The Overland report does mention SBCS in a supplemental report, but only to identify SBCS as a new affiliate that "'may"' be relevant to the so-called findings issued in the main body of the report. See Borsodi Reply Aff. ¶ 10 (quoting Overland Second Supplemental Report at S12-1). AT&T misleadingly suggests otherwise, by claiming that SBC Services – an administrative support shared services affiliate that is mentioned several times in the Overland report – is actually SBC's section 272 affiliate. See AT&T Comments at 8. That is not so. See Borsodi Aff. ¶ *6* n.3.

transferred" customer proprietary network information ("CPNI") to unregulated affiliates, and that this transfer amounts to "improper cross-subsidization by Pacific." AT&T Comments at 59. But the basis for Overland's discussion of CPNI was the access a Pacific affiliate receives when acting as a sales agent on behalf of Pacific. See Borsodi Reply Aff. ¶ 10. In view of the 1996 Act's express endorsement of joint marketing by Pacific on behalf of SBCS, it is impossible to see how any such relationship could advantage SBCS in a way that is not already authorized under section 272(g). In any case, the access at issue is fully consistent with the rules and regulations governing the use of CPNI. Id. Similarly, with regard to accounting controls, while AT&T makes much of Overland's isolated statements regarding Pacific's internal accounting controls, see AT&T Comments at 60, it ignores the fact that these statements were made in the context of a largely favorable review. Thus, even Overland had to concede that the "'majority of the FCC procedures for allocating. . . costs between regulated and nonregulated accounting categories were well controlled,"' that "'SBC and Pacific Bell had accounting systems in place during the audit period to identify and bill affiliate services in all of the areas . . . reviewed,"' and that, to the extent Overland identified what it believed to be "control weaknesses," they did not have "'a material impact."' See Borsodi Reply Aff. ¶ 12 (quoting Overland Report at 1-3 (Feb. 21, 2002)).[44]

[44] By its own terms, AT&T's additional statement that "many core operations are performed by the same SBC affiliates" (AT&T Comments at 91-92 & n.200) refers to services that are lawful under the 1996 Act. See Yohe Aff. ¶¶ 11-14 & Attach. A; see also Camsalez Aff. ¶¶ 10-15. As for the allegation that Pacific "obstructed" the Overland report, see AT&T Comments at 63-64, the truth is that, while the litigation before the CPUC regarding the validity of the report has been contentious, Pacific fully cooperated with Overland's investigation while it was underway, see Borsodi Reply Aff. ¶ 13.

It is accordingly clear that even if, as AT&T contends (at 63), the Overland report were "the best evidence available," it would not rebut SBC's showing that it will provide interLATA services in California in accordance with section 272. As it happens, moreover, the Overland report is far from the "best evidence available." That distinction instead goes to the results of the Joint Federal/State Oversight Team's first Biennial Audit of the compliance of the various SBC Bell companies (including Pacific) and SBCS with section 272. See Henrichs Reply Aff. ¶¶ 3-4 & Attach. A (Reply App., Tab 8). Unlike the Overland report, the Biennial Audit is **a** real audit, conducted by real auditors. And, also unlike the Overland report, it actually reviewed the relationship between Pacific and SBCS, and it did so for the express purpose of determining whether that relationship is consistent with section 272 and the Commission's rules.

This comprehensive audit provides conclusive evidence that SBC's provision of interLATA services in California will comply with the requirements of section 272. Indeed, the Biennial Audit ***already*** reviewed numerous aspects of the relationship between Pacific and SBCS – including accounting systems, transaction flows, payroll, and the recording of affiliate transactions – and concluded that they comply with section 272. See id. ¶ 7. In these areas, there is no need to speculate over whether Pacific and SBCS will comply with section 272 and the Commission's safeguards, since an independent audit has already concluded that they do. Id. & Attach. A.[45] Moreover, in those states where SBC was providing interLATA service during the time period reviewed, the Biennial Audit also concludes that those services were in fact provided and accounted for in a manner consistent with section 272 and the Commission's

[45] This conclusion is also confirmed by the unblemished record of SBC Bell companies, including Pacific, with Part 64 of the Commission's rules, as verified by many years' worth of Cost Allocation Manual audits. See Henrichs Reply Aff. ¶ 11 & Attach. B.

safeguards. See id. ¶ 4. As noted above and explained in the Application, Pacific and SBCS will operate in accordance with the same structural, nondiscrimination, and accounting safeguards that are in place in the states where SBC has already received section 271 relief. The Biennial Audit's conclusion that SBC has in fact adhered to those safeguards in the states where it is already providing interLATA service is compelling evidence that those same safeguards will be effective in California.[46]

V. ADDITIONAL ISSUES

The remaining issues raised by commenters fail to rebut SBC's showing that it meets all the requirements for section 271 relief.

A. Checklist Item 4: Unbundled Local Loops

As demonstrated in the Application, Pacific provides nondiscriminatory access to local loop transmission in full compliance with Checklist Item 4. SBC Br. at 52-67. For the vast majority of loop types in service in California, no commenter questions Pacific's performance in the pre-ordering, ordering, provisioning, maintenance of unbundled loops. Nor could they. Pacific has provisioned close to half a million stand-alone unbundled loops in the state of California, see J.G. Smith Aff. ¶ ***6,*** and its performance on those loops has been outstanding. This sheer volume, coupled with the dearth of complaints on this checklist item, demonstrates

[46] AT&T's remaining challenge to SBC's section 272 showing centers on its concern that Pacific has not committed to the joint marketing restrictions set out in the CPUC Final Decision. See AT&T Comments at **63-68.** We address that claim in detail above, see supra Part III.A, and will not belabor the point here. In short, SBC's joint-marketing plans fall squarely within the "safe harbor" this Commission identified in the South Carolina Order, and they are accordingly consistent with the requirements of section 272(g). Even assuming the CPUC has authority to impose requirements in excess of those put in place by the Commission, there can be no serious argument that its exercise of that authority somehow takes Pacific's otherwise adequate joint-marketing plans out of compliance with federal law.

that Pacific provides its competitors a meaningful opportunity to compete in the local exchange market.

Indeed, CLEC comments on this checklist item are notable more for what they do not say. Commenters do not challenge Pacific's performance in provisioning hot-cut loops, although that topic was a primary subject of comments before the CPUC. See CPUC Final Decision at 135-37 (summarizing comments). Likewise, with one narrow exception discussed below, no commenter faults Pacific's performance in provisioning stand-alone xDSL-capable loops, including line-shared loops and related services, though it too was featured prominently in the CPUC proceeding. Id. at 145-50 (same).

To the extent they address Checklist Item 4 at all, commenters focus almost exclusively on Pacific's performance in provisioning and maintaining unbundled DS1 loops. See **XO** Comments at 16-21; AT&T Comments at 48-49. As a preliminary matter, however, DS1 loops constitute a tiny fraction – approximately 2 percent – of all the unbundled loops currently in service in Pacific's service area. See Johnson Reply Aff. ¶ 45. As the Commission has recognized, allegations relating to such a minute portion of unbundled loops in service are by their nature insufficient to call into question checklist compliance. See New Jersey Order ¶¶ 136,148; see also AT&T Corp. v. FCC, 220 F.3d 607,624 (D.C. Cir 2000) ("the FCC reasonably interpreted section 271 to allow assessment of **an** applicant's ***overall*** provisioning **of** loops") (emphasis added).

In any event, **the** criticisms of Pacific's DS1 loop performance fail to present a complete picture of Pacific's actual record. Thus, for example, while AT&T and XO argue that Pacific misses a greater percentage of due dates when provisioning DS1 loops for CLECs than for its

own retail customers, see AT&T's Toomey/Walker/Kalb Decl. ¶¶ ***65-66;*** XO Comments at 17, they focus on Pacific's performance for a single region in California. Statewide data demonstrate that CLECs receive unbundled DSI loops more quickly than do Pacific's retail customers, see Johnson Reply Aff. ¶ 31, and it is such statewide data on which the Commission has previously placed primary reliance.[47] Likewise, XO attacks the quality of Pacific-provisioned DS1 loops, arguing that CLEC DSI loops experience a greater percentage of troubles within 30 days (PM 16). See XO Comments at 17-18. In fact, on a statewide basis, CLEC customers experienced fewer troubles within 30 days of installation statewide than did Pacific's own customers in both August and September 2002. See Johnson Reply Aff. ¶ 36.

As ***for*** XO's opportunistic challenge to Pacific's performance in meeting DS1 **loop** maintenance and repair appointments, see XO Comments at 17, XO has not offered any evidence to suggest that it has suffered competitive impairment. As the Commission has stressed, the absence of such evidence is itself powerful evidence that the complaint is not competition-affecting and is therefore insufficient to call into question checklist compliance.[48]

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[47] See Arkansas/Missouri Order ¶ 108 (rejecting focus on DS1 performance in Kansas City and St. Louis markets, and concluding that "[t]he relevant performance metrics . . . are based on statewide performance").

[48] See New Jersey Order ¶ 137 ("we look for patterns of systematic performance disparities that have resulted in competitive harm or that have otherwise denied new entrants a meaningful opportunity to compete"). As Gwen Johnson explains in her reply affidavit, Pacific's DS1 performance on PMs 20 and 21 – both of which are parity measures tracking the time in which Pacific restores DS1 troubles – is explained by the fact that Pacific's retail troubles result in far more "no trouble found" and "test okay" results. &Johnson Reply Aff. ¶ 46. Because those types of troubles are resolved more quickly than most other types, the disproportionate number of such troubles in Pacific's retail orders results in shortening the interval to which Pacific's wholesale performance is compared. See id.

In any case, viewed as a whole, Pacific's maintenance and repair performance is sufficient to provide CLECs a meaningful opportunity to compete. CLEC DSI customers experience fewer troubles than do Pacific's retail customers, and the CLEC trouble report rate for DSI loops has consistently been below 3 percent. See Johnson Reply Aff. ¶ 45. And, as for AT&T and XO's focus on discrepancies in the mean time to restore DS1 loops (PM 21), see XO Comments at 17-19; AT&T's Toomey/Walker/Kalb Decl. ¶ 78, the actual figures involve a difference in only approximately 30 minutes, see Johnson Reply Aff. ¶ **47.** Confronted with a more substantial discrepancy (of two hours) in the Arkansas/Missouri proceeding, the Commission concluded that the "disparity reflects a minimal time difference to restore service for Arkansas competitive LECs [as compared to] SWBT retail customers." Arkansas/Missouri Order ¶ 107 & n.336. Given the limited number of CLEC customers that experience any trouble in the first place, the minimal disparity in California could not have affected AT&T's or XO's ability to compete in the California local market.

Moreover, Pacific's DS1 performance is superior **to** that of other carriers whose section 271 applications have been already approved by the Commission. In New Jersey, for example, Verizon's mean time to restore DS1 troubles was more than eight hours in two of the five months that the Commission considered. See New Jersev Order ¶ 149 n.443. **By** contrast, Pacific's mean time to restore DSI troubles has averaged a mere four hours between June and September (PM 21-96001). Likewise, while BellSouth missed an average of 7 percent of its DS1 installation appointments requiring a dispatch in Louisiana, see Georgia/Louisiana Order ¶ 234, Pacific routinely meets more than 98 percent of its DSI installation appointments, see Johnson Reply Aff. ¶ 31. **As** these comparisons demonstrate, Pacific provisions and maintains

DS1 loops in California in a manner that offers CLECs a meaningful opportunity to compete. Nothing more is required under the 1996 Act and this Commission's precedent.[49]

Although DOJ does not expressly identify resolution of this checklist item as a condition of its recommended approval, it does state that Pacific's maintenance and repair performance for UNE loops "warrants further scrutiny." DOJ Eval. at 3 n.10. In particular, aside from the DSI issues discussed immediately above, DOJ points to Pacific's performance with respect to UNE-P maintenance measures. See id. As the reply affidavit of Gwen Johnson explains, the performance disparities in this area have been minimal – a fraction of a percentage point on percentage of missed maintenance commitments in September, for example, and no greater than two percentage points in July and August. See Johnson Reply Aff. ¶ 53; see also id. ¶ 55 (discussing repeat trouble report rate). Moreover, these minimal disparities apply to a minute base of UNE-P lines on which troubles are reported in the first place – less than 1 percent of total UNE-Ps in service. See id. ¶ 56. In view of CLECs' growing use of UNE-P in California in recent months, see supra Part I, Pacific's maintenance and repair of that product is plainly not inhibiting their ability to compete in the local market.[50]

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[49] Pacific has in addition put in place process changes to improve its DS1 performance further. See Johnson Reply Aff. ¶ 44; Motta Aff. ¶¶ 45-51.

[50] With respect to AT&T's allegation regarding repeat troubles for stand alone xDSL loops, see AT&T's Toomey/Walker/Kalb Decl. ¶ 71; see also DOJ Eval. at 3 n.10, Pacific has detailed its efforts to improve performance, and those efforts are already bearing fruit. See Johnson Reply Aff. ¶ 43; see also id. ¶¶ 41-42 (explaining that the average time to restore xDSL loops has improved significantly as a result of the elimination of defective circuit packs); Motta Aff. ¶ 35 (explaining that perceived performance shortfalls on restoral of xDSL loops were due to a design flaw in one type of circuit pack).

B. Checklist Item *5:* Unbundled **Local** Transport

In two **ex** parte filings provided after the deadline for comments on the Application, Telscape alleges that Pacific fails to provide access to shared transport for intraLATA toll calls, and that it accordingly fails to satisfy Checklist Item 5.[51] This contention fails on multiple grounds, the most obvious of which is that Checklist Item 5 refers only to "[l]ocal transport." See 47 U.S.C. § 271(c)(2)(B)(v). Shared transport for intraLATA toll calls is plainly not "[l]ocal transport." A requirement to provide such functionality therefore cannot be enforced under Checklist Item 5. See id. § 271(d)(4) ("[t]he Commission may not, by rule or otherwise, . . . extend the terms used in the competitive checklist").

In any event, Pacific does in fact provide shared transport for intraLATA toll. As described in the affidavit of Colleen Shannon, see Shannon Aff. ¶ 94 (App. A, Tab 20), Pacific offers shared transport for intraLATA toll in accordance with the order of the California PUC in the AT&T arbitration.[52]

Telscape nevertheless points to a recent Commission order fining SBC for alleged failure to comply with the shared-transport condition set out in the SBC/Ameritech merger conditions, and argues that, in light of that order, the Commission "cannot" conclude that SBC satisfies Checklist Item 5. See Telscape October 18 Ex Parte at *5*. This claim is hopelessly confused. The order on which Telscape relies – which in any event was released well after SBC filed the

[51] See Telscape October 18 **Ex** Parte at 4-5; Telscape October 24 **Ex** Parte, Attach. at 12-13.

[52] Opinion, Application of AT&T Communications of California, Inc., et al., for Arbitration, D.00-08-011 (Cal. PUC Aug. 3,2000) (App. C, Tab 64).

Application and is not final even yet[53] – involves SBC's shared-transport offering in the Ameritech region.[54] The finding of liability in that order therefore has no bearing whatsoever on the sufficiency of Pacific's showing on Checklist Item 5 in California. Indeed, in the very order on which Telscape relies, the Commission cites with approval the CPUC arbitration order that gave rise to Pacific's offering of shared transport for intraLATA toll.[55] Thus, to the extent it is relevant at all, the Commission's recent forfeiture order only confirms the adequacy of Pacific's shared-transport offering.

In any event, as set forth in the reply affidavit of Colleen Shannon, Pacific recently offered CLECs in California an amendment that permits them generally to use shared transport for intraLATA toll in conjunction with unbundled switching. See Shannon Reply Aff. ¶ 15. Coupled with the shared transport offering ordered by the CPUC and endorsed by the Commission, this latest offering establishes beyond legitimate dispute that Pacific permits CLECs to use shared transport for intraLATA toll in accordance with the Commission's rules.

C. Checklist Item 11: Number Portability

SBC's opening brief demonstrated that Pacific's local number portability ("LNP") processes and procedures are consistent with both industry practice and the requirements this

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[53] Unless and until SBC pays the fine ordered by the Commission – or until that fine is adjudicated in federal court – section 504(c) precludes the Commission from "us[ing]" the enforcement order "to the prejudice" of SBC "in any other proceeding before the Commission." 47 U.S.C. § 504(c).

[54] See Forfeiture Order, SBC Communications Inc. Notice of Apparent Liability for Forfeiture, File No. EB-01-IH-0030, FCC 02-282, ¶ 1 (rel. Oct. 9,2002) (noting that the allegations at issue in the case involve SBC's shared-transport offering "in the former Ameritech states").

[55] See id. ¶ 15 & n.45.

Commission has set out in previous section 271 orders. See SBC Br. at 74-76; see also E. Smith Aff. ¶¶ 10-14 (App. A, Tab 21). Without disputing either of those points, a number of commenters nevertheless challenge Pacific's showing on the theory that, at the time of the Application, Pacific had not yet implemented a mechanized NPAC check for stand-alone LNP orders. See AT&T Comments at 50-55; Sprint Comments at 14; XO Comments at 21-22; PacWest Comments at 21-23; see also CPUC Final Decision at 199-200 (describing implementation of NPAC Verification check as necessary to checklist compliance).

As DOJ points out, however, this Commission "has not previously required a mechanized process to be in place for checklist compliance." DOJ Eval. at 4 n.13. Nor is there any basis to do so on this record. Indeed, while AT&T contends that such an enhancement is required due to Pacific's supposedly poor performance on same-day stand-alone LNP cancellation requests, see AT&T Comments at 53-54; AT&T's Willard Decl. ¶¶ 64-76, the fact of the matter is that, from July through September, Pacific met more than **99** percent of such requests from AT&T without complaint. See E. Smith Reply Aff. ¶ 7 (Reply App., Tab 15). Moreover, Pacific's LNP performance generally has easily surpassed the standards set by the CPUC. See id. ¶ 5. Thus, even without the mechanized NPAC check, Pacific's LNP performance was easily sufficient to provide CLECs a meaningful opportunity to compete. See id.; see also DOJ Eval. at 4 (noting that the absence of a mechanized verification process "do[es] not appear to preclude approval of SBC's application").

In any event, on September 30, 2002, Pacific in fact implemented the requested mechanized NPAC check as scheduled, and it recently provided data to the CPUC demonstrating the success of that implementation. See E. Smith Reply Aff. ¶¶ 8-9 & Attach. A. Thus, even

assuming that the NPAC check is a requirement for 271 relief – and it is not – Pacific still satisfies Checklist Item 11

Aside from the NPAC verification process, the only other issue raised regarding Checklist Item 11 relates to the timeliness of Pacific's process for completing "LNP with loop" orders where the end user receives DSL-based Internet access over the high-frequency portion of the loop. See XO Comments at 22-24. Prior to porting the loop in these circumstances, Pacific awaits notification from the data CLEC – which may be Pacific's affiliated advanced services provider (ASI), but which also may be an unaffiliated carrier – that it no longer wishes to provision service over the loop in question. See Chapman Aff. ¶ 90 (App. A, Tab 3); Chapman Reply Aff. ¶ 9 (Reply App., Tab 3); see also Habeeb Reply Aff. ¶ 8 (Reply App., Tab 7) (noting that ASI's practice is to transmit a disconnect notice to Pacific upon receiving it from an ISP). It is only by awaiting such notification that Pacific can ensure (i) that the end user's data service will not be terminated without the end user's knowledge or permission, and (ii) that the data CLEC is afforded its rights under the Line Sharing Order[56] to purchase the entire loop – or to enter into a line-splitting arrangement with another carrier – when the customer terminates his or her ILEC voice service on a line-shared loop. See Chapman Reply Aff. ¶ 9.[57] Once it receives

[56] Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, Deployment of Wireline Services Offering Advanced Telecommunications Capability, 14 FCC Rcd 20912,172 (1999), vacated and remanded, United States Telecom Ass'n v. FCC, 290 F.3d 415 (D.C. Cir. 2002), limited stay wanted (D.C. Cir. Sept. 4,2002).

[57] See also Third Report and Order on Reconsideration in CC Docket No. 98-147, Fourth Report and Order on Reconsideration in CC Docket No. 96-98, Third Further Notice of Proposed Rulemaking in CC Docket No. 98-147, Sixth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, Deployment of Wireline Services Offering Advanced Telecommunications Capability, 16 FCC Rcd 2101, ¶ 22 (2001) ("[I]n the Line Sharing Order, the Commission indicated that in the event that a customer terminates incumbent LEC provided voice service on a line-shared line, the competitive data carrier is required to purchase the full stand-alone loop

such notification in the form of a disconnect request, Pacific promptly processes the request and is then able to process and provision a winning CLEC's "LNP with loop" request. See Chapman Aff. ¶ 90. Pacific's policies, in short, are fully consistent with the Commission's orders. XO's complaint accordingly does not rebut Pacific's showing of checklist compliance.

D. Checklist Item 13: Reciprocal Compensation for the Exchange of Local Traffic

Raising an issue that they have declined to pursue before the CPUC, PacWest and RCN allege that Pacific has failed to pay tandem rates for the termination of local traffic in accordance with this Commission's rules. See PacWest Comments at **29-30.** Although the Commission's rules mandate the payment of tandem rates only where the CLEC's switch "serves a geographic area comparable to the area served by the [ILEC's] tandem switch," 47 C.F.R. § 51.711(a)(3), PacWest and RCN believe the Commission actually requires the payment of tandem rates wherever a CLEC switch is "capable" of serving an area comparable to an ILEC switch. And, although they provide no evidence whatsoever to support their claim, they allege that their switches in fact meet this test. See PacWest Comments at 29-30.

PacWest and RCN omit a critical fact, however. The interconnection agreements under which they currently operate do not incorporate the language set forth in the FCC's regulations, but rather provide for the payment of tandem rates only where the terminating carrier's switch performs a tandem "function." See Shannon Reply **Aff.** ¶ 17. That agreement language, moreover, was negotiated, see id., which means it was entered into "without regard to the

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network element if it wishes to continue providing xDSL service. We note, however, that the formerly line sharing data carrier also could enter into a voluntary line splitting arrangement with a new voice carrier.")(footnote omitted).

standards set forth in" section 251 or, by extension, **the** Commission's rules, see 47 U.S.C. § 252(a)(1). The question, then, is not whether PacWest's and RCN's switches qualify for tandem rates under the Commission's rules, but whether they actually provide a tandem switching function. And neither party has alleged – much less proven – that it meets that standard."

Equally meritless is PSI's and Touch Tel's allegation that Pacific has failed to comply with the Commission's rules regarding payment for facilities and traffic delivered to wireless providers. See PSI/Touch Tel Comments at 3-4. At bottom, these carriers object to Pacific's practice of billing for such facilities and traffic. As Pacific has made clear, however, it bills the amounts in question solely because the parties have not yet reached agreement on which if any facilities are not subject to charge, and so that Pacific may preserve its rights pending the conclusion of negotiations surrounding that and other issues. See Shannon Reply Aff. ¶ **28.** More to the point, as PSI's and Touch Tel's own attachments reveal, Pacific **has** not taken "any adverse action against a paging provider that fails to pay the portion of its bill attributable to charges for facilities used to deliver traffic originated on Pacific Bell's network." PSI/Touch Tel Comments, Exh. 1B at 1 (letter from Pamela Gillette, Pacific, to Jeff Smith, Touch Tel Corp.);

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[58] Under a binding decision of the United States District Court for the Northern District of California, even if PacWest's and RCN's agreements incorporated the Commission's rule, they would still not be entitled to tandem rates unless they could demonstrate that their switches actually serve a geographic area comparable to Pacific's. See MCI WorldCom Communications, Inc. v. Pacific Bell Tel. Co., No. C-00-2171 VRW, 2002 WL 449662, at *5 (N.D. Cal. Mar. 15, 2002) ("[T]he geographic scope test focuses on the area currently being served by the competing carrier, not that area the competing carrier may in the future serve.") (internal quotation marks omitted).

see Shannon Reply Aff. ¶¶ 29-31. PSI's and Touch Tel's contention that Pacific runs afoul of the checklist is accordingly groundless.

E. Checklist Item **14: Resale**

A number of commenters contend that Pacific fails Checklist Item 14 because neither it nor its data affiliate ASI provides a stand-alone DSL transmission product at a wholesale discount under section 251(c)(4). See, e.g., AT&T Comments at 49-50; Sprint Comments at 14; DIRECTV Comments at 10-14; XO Comments at 24-25; PacWest Comments at 23-26. As explained in the Application, however, neither Pacific nor any SBC affiliate provides such a stand-alone DSL transmission product "at retail." See SBC Br. at 81; Habeeb Aff. ¶ 15 (App. A, Tab 8). Thus, under the plain language of the statute – which applies only to those telecommunications services that an ILEC provides "at retail,'' 47 U.S.C. § 251(c)(4) – neither Pacific nor any SBC affiliate is required to make any such service available for resale at the wholesale discount.

As SBC further explained, moreover, and as no party seriously disputes, SBC's position on this issue is in all material respects identical to the position it took in the Arkansas/Missouri application and to the position BellSouth took in the Georgia/Louisiana application. See SBC Br. at 81. And in both those cases, the Commission concluded that the Bell company applicant "d[id] not have a present obligation to offer DSL transport service for resale" under section 251(c)(4), and that it accordingly satisfied Checklist Item 14.[59] That same analysis applies here,

[59] Arkansas/Missouri Order ¶ 84; see id. ¶¶ 79-84; Georgia/Louisiana Order ¶¶ 274-277. No party appealed the Commission's resolution of this question in either case. Indeed, in BellSouth's subsequent five-state application, no party even bothered to raise this under Checklist Item 14. See Five-State Order ¶ 270.

and, as DOJ recognizes, it mandates a finding that SBC complies with this checklist item. See DOJ Eval at 4 & n.13 (noting that this claim "do[es] not appear to preclude approval of SBC's application")

Nor is it of any material significance that the California PUC believes that the Commission should impose this new legal requirement as a condition of granting section 271 relief. See CPUC Final Decision at 215-20. As the Commission has previously observed, although it is required by statute to "consult" with the state commission regarding Track A and the competitive checklist, "as the expert agency charged with implementing section 271, [the Commission is] required to make an independent determination of the meaning of statutory terms in section 271." Oklahoma Order ¶ 15.[60] The Commission has already made such an "independent determination" on this issue, on the same facts as are at issue here. Unless Pacific is to be held to a different standard than other Bell companies that have already been granted section 271 relief – and there is plainly no lawful basis for such an approach – the Commission must conclude, as it has before, that SBC is under no current obligation to offer a stand-alone DSL transport product for resale at the wholesale discount, and that it accordingly satisfies Checklist Item 14.[61]

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[60] See also SBC Communications Inc. v. FCC, 138 F.3d 410,416 (D.C. Cir. 1998) ("Although the Commission must consult with the State commissions, the statute does not require the FCC to give the State commissions' views any particular weight."); DOJ Eval. at 5 n.15 ("The Telecommunications Act of 1996 requires the FCC to consult with state commissions on issues of checklist compliance but does not require it to give special weight to state commission views, although it may choose to do so.") (citing Michigan Order ¶¶ 30, 34; South Carolina Order ¶ 27).

[61] As DIRECTV candidly acknowledges (at 8), the Commission has previously rejected its claim that Bell companies are required to provide a single point of interconnection for contiguous LATAs. E.g., Vermont Order ¶ 47. Vycera's allegation (at 2-9) that Pacific has not permitted it to opt-in to an agreement, and that it therefore violates Checklist Item 1, is addressed

CONCLUSION

The Application should be granted.

Respectfully submitted,

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in the reply affidavit of Colleen Shannon. See Shannon Reply Aff. ¶¶ 2-7. Finally, the Commission has previously rejected Sprint's claim (at 4-7) that the financial difficulties of some CLECs should color this Commission's review of the Application. E.g., New Hampshire/Delaware Order ¶ 140.